A

DIBENA ENTERPRISE SDN BHD

v.

HUAWEI TECHNOLOGIES (MALAYSIA) SDN BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[CIVIL SUIT NO: D-22NCC-71-2011]
16 FEBRUARY 2012

C

CIVIL PROCEDURE: *Discovery - Application for - Discovery and inspection of documents - Whether a person in possession of another's document can be compelled to produce it - Whether documents sought confidential in nature - Whether document can be produced for*

D

identification purposes - Rules of the High Court 1980, O. 24 - Evidence Act 1950, s. 131

CIVIL PROCEDURE: *Discovery - Confidential documents - Whether a person in possession of another's document can be compelled to produce it - Whether documents sought confidential in nature - Whether document*

E

can be produced for identification purposes - Rules of the High Court 1980, O. 24 - Evidence Act 1950, s. 131

CIVIL PROCEDURE: *Disclosure of documents - Confidential documents - Possession of documents belonging to company not party to*

F

action - Whether defendant can be compelled to disclose contents of documents - Whether document can be produced for identification purposes - Rules of the High Court 1980, O. 24 - Evidence Act 1950, s. 131

CIVIL PROCEDURE: *Documents - Discovery and inspection of*

G

documents - Whether a person in possession of another's document can be compelled to produce it - Whether documents sought confidential in nature - Whether document can be produced for identification purposes - Rules of the High Court 1980, O. 24 - Evidence Act 1950, s. 131

H

This was the plaintiff's application under O. 24 of the Rules of the High Court 1980 ('RHC') for discovery of documents which was in the first defendant's custody. Among the documents required were, namely, contracts, purchase orders, statements of accounts or any other documents between the first defendant and/or

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Huawei Tech. Investment Co. Ltd ('Huawei Hong Kong') and between these parties and the second defendant. The documents sought to be discovered also implicated Huawei Hong Kong,

which was not a party to this action. However, the defendants opposed this application by contending, *inter alia*, that, (i) the documents sought to be discovered were strictly confidential and would prejudice them; (ii) the documents contained sensitive commercial trade secrets which if disclosed would have an adverse impact on the defendants as well as Huawei Hong Kong; and (iii) the plaintiff's prayers were too wide and ambiguous which would amount to an abuse of the court's process. According to the first defendant, the documents sought to be discovered were not relevant to the plaintiff's case and also that it could not be compelled to disclose any document which concerned Huawei Hong Kong. The issue that arose for consideration was whether the first defendant could be compelled to produce a document which might also mention Huawei Hong Kong for which the latter could take a legitimate objection to production on account of confidentiality, sensitivity or it being a commercial secret.

Held (allowing discovery partially):

(1) Under O. 24 r. 12 RHC, an application for discovery can be made at any stage of the proceedings in any cause or matter and the court may, subject to r. 13(1), order any party to produce any documents in his possession, custody or power and the court may deal with the document when produced in such manner as it thinks fit. (para 2)

(2) The general principle underlying s. 131 Evidence Act 1950 ('the Act') appears to be that a person, who is in possession of another's document, cannot be compelled to produce a document if the other person refuses to do so. Hence, the first defendant could not be compelled to disclose the contents of any documents which might result in the disclosure of confidential, secret or privileged information in which Huawei Hong Kong might be in a position to raise an objection. Nevertheless, in view of the strictures posed by s. 131 of the Act, any disclosure or documents from or to Huawei Hong Kong must also be limited to disclosure for purposes of identification merely, if the first defendant is of the opinion that it will not be at liberty to disclose it under s. 131. Ultimately, these issues can only be resolved if and when Huawei Hong Kong is added as a party. (paras 20, 21 & 24)

A **(3)** A further refinement of the plaintiff's prayers will be required. It will not be fair or necessary for the fair disposal of the pleaded case to allow documents relating to all projects mentioned in the letters of undertaking. The pleaded case herein was in relation to the project known as the "Next
B Generation Network Project" and therefore, this application for disclosure of documents should be so limited. Further, the reference to all contract documents to be disclosed should not be allowed unless the plaintiff provides a more specific list of contract documents. (para 25)

C *[Order accordingly.]*

Legislation referred to:
Evidence Act 1950, ss. 130(2), 131
Rules of the High Court 1980, O. 24 rr. 1(1), 2, 12, 13(1)

D *For the plaintiff - Dato' Firoz Hussein Ahmad Jamaluddin (Dinesh Raja & Shahira with him); M/s Hafarizam Wan & Aisha Mubrak*
For the 1st defendant - James Ee (Colin Liew with him); M/s KF EE & Co
For the proposed intervener (Telekom Malaysia Bhd) - P Jayakumar (Stev Kenny with him)
E *For the proposed intervener (Huawei Tech Investment Co Ltd) - Kevin Sathiaseelan*

Reported by Kumitha Abd Majid

F

JUDGMENT

Mohamad Ariff Yusof J:

Ruling On encl. 34 (Plaintiff's Application For Discovery)

G

[1] In this application by the plaintiff for discovery of documents, the plaintiff is applying to require the 1st defendant (Huawei Technologies (Malaysia) Sdn Bhd) to produce all documents in the defendant's custody, namely contracts, purchase orders,
H statements of account or any other documents between the 1st defendant and/or Huawei Tech. Investment Co. Ltd, and between these parties and Telekom Malaysia Berhad, which the 1st defendant has in its possession, custody or control which are necessary for the proper disposal of this case before this court.

I

[2] The application is made under O. 24 r. 1(1) rr. 2, 12 and 13(1) of the Rules of the High Court 1980. It is pertinent to note that under O. 24 r. 12, an application for discovery can be made "at any stage of the proceedings in any cause or matter" and the court may, subject to r. 13(1), order any party to produce to the court any documents in his possession, custody or power and the court may deal with the document when produced "in such manner as it thinks fit". Rule 13(1) specifies that no order for the production of such documents "for inspection or to the court" shall be made "unless the court is of opinion that the order is necessary either for disposing fairly of the cause or matter for saving costs". What is stated in a r. 13(1) is a well-established principle laying down the tests of "necessary" for "disposing fairly" of the cause or matter, or "for saving costs".

[3] In making this application, the plaintiff refers to information disclosed in the affidavit in reply filed by the 2nd defendant, Telekom Malaysia, in para. 19 thereof, in which reference is made to tender documents in which the plaintiff is stated by the 1st defendant, Huawei Malaysia, as its "local partner". According to Dato' Firoz Hussein, counsel for the plaintiff, it is documents like these that should have been subject to a legal obligation to disclose by Huawei Malaysia, but has not been disclosed. This non-disclosure amounts to a suppression of evidence. Hence, the present application has been filed to obtain documents which will be necessary for the current dispute between the plaintiff and the defendants to be fairly disposed. In terms of its relevance and necessity, counsel refers this court to the decision in *Captain Gregos* (Times Law Report, 21 December 1990), a decision of the English Court of Appeal, to the passage reading:

> The test to be applied is not the probative value of the documents but whether the documents might or could reasonably be expected to provoke a line of inquiry which would be of assistance to a party. If so, that party should have an opportunity to peruse the documents.

[4] This application is strongly opposed by the 1st defendant. The 2nd defendant in this action, namely Telekom Malaysia Berhad, is likewise opposing the application. There is one common ground of objection, however. Both parties argue that the documents sought to be discovered are strictly confidential and will greatly prejudice the defendants.

[5] The documents sought to be discovered also implicate Huawei Tech Investment Co Ltd ("Huawei Hong Kong"), but at this stage Huawei Hong Kong is not a party in this action, although there is a pending application by the plaintiff to add Huawei Hong Kong as a party. This application has yet to be heard and disposed of.

[6] In the circumstances, the 1st defendant (Huawei Malaysia), aside from describing this application as "commercial espionage on the dealings between the defendant, Huawei Tech. Investment Co. Ltd and Telekom Malaysia Berhad", opposes the discovery because these documents sought contain sensitive commercial trade secrets which, if disclosed, will have an adverse impact on the defendants as well as Huawei Hong Kong's and Telekom Malaysia Berhad's commercial and technological competitiveness. Further, if allowed, the commercial relations between Huawei Malaysia, Telekom Malaysia Berhad and/or Huawei Hong Kong will be jeopardised. According to Huawei Malaysia, these documents contain, *inter alia*, sensitive pricing details and other commercial and trade secret information.

[7] Both defendants also argue that the prayers are too wide and ambiguous and amount to an abuse of the court's process. To Huawei Malaysia, the plaintiff's application amounts to a "fishing expedition".

[8] As far as Telekom Malaysia Berhad is concerned, it is emphasised that the documents sought to be discovered contain commercial arrangements between the defendants, trade secrets, sensitive pricing details, and sensitive technical specifications for the project which is itself a blueprint and/or master plan for the future generation of the telecommunications industry in Malaysia. These documents contain proprietary information that is of a confidential nature, and in this regard Huawei Malaysia, Huawei Hong Kong and Telekom Malaysia Berhad have covenanted to use such information only for the project and are prohibited from divulging any proprietary, confidential and commercially sensitive information to any third party.

[9] In addition to these common grounds between the defendants, Telekom Malaysia has drawn this court's attention in its submission on the existence of the consent order between the plaintiff and Telekom Malaysia Berhad dated 1 December 2011,

by which safeguards have been put in place in respect of exhs. "DAH2" and "ID21", which require both documents to be expunged since they contain proprietary information of a confidential nature, and essentially the substitution of a copy of the contract with the sensitive and confidential information "covered up". Putting it shortly, Telekom argues the plaintiff cannot be permitted to circumvent the consent order by its discovery against Huawei Malaysia.

[10] Huawei Malaysia also takes a general point that these documents sought to be discovered are not really relevant to the plaintiff's case and therefore not required or necessary for the fair disposal of the case.

[11] In submission, Mr. James Ee, counsel for Huawei Malaysia, strongly positions his opposition on s. 131 of the Evidence Act 1950, which reads:

> **131. Production of documents which another person having possession could refuse to produce.**
>
> No one shall be compelled to produce documents in his possession which any other person would be entitled to refuse to produce if they were in its possession, except for the purpose of identification, unless the last mentioned person consents to their production, nor shall anyone who is entitled to refuse to produce a document be compelled to give oral evidence of its contents.

[12] According to this argument, Huawei Malaysia cannot be compelled to disclose any document which concerns Huawei Hong Kong, although Huawei Malaysia might also be in possession of the document or be a party to it, since there will be an issue of shared ownership. Huawei Malaysia is not at liberty to disclose in a situation where Huawei Hong Kong as an outside party will have a right not to consent to disclosure. Huawei Hong Kong will fall within the definition of "any other person (who) would be entitled to refuse to produce if they were in its possession".

[13] There is a distinct dearth of authority on the meaning and effect of s. 131 in Malaysia, but there is something to be said in favour of the reading being placed on it by counsel for Huawei Hong Kong.

[14] Section 131, although included in that Chapter of the Evidence Act pertaining to "Witnesses" (Chapter IX), is nonetheless broadly worded, and could be read to possibly cover a party to the action against whom discovery is sought. After all, even a party to an action will be a witness, or will have witnesses called, to support his case, and these persons will be subject to the provisions of s. 131.

[15] I have taken note that the section preceding s. 131, namely s. 130 also alludes to a witness "who is a party to the suit", despite the abovesaid Chapter heading. See s. 130(2):

> **130. Production of title deeds of witness not a party**
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> ...
>
> (2) No witness who is a party to the suit shall be bound to produce any document in his possession or power which is not relevant or material to the case of the party requiring its production ...

[16] The issue, therefore, is whether Huawei Malaysia can be compelled to produce a document which might also mention Huawei Hong Kong and which could also be in the possession of Huawei Hong Kong, and for which Huawei Hong Kong could take a legitimate objection to production, say on account of confidential, sensitive or commercial secret reasons, or under any of the established heads of privilege.

[17] Some insight into the principle and scope of the section can be found in the commentary in *Sarkar's Law of Evidence* (16th edn., 2007):

> Principle and Scope – section 130 relates to the case when the document is the title deed of the witness (not a party); while Section 131 refers to documents of another person in the possession of the witness, ie, documents although physically in the possession of a witness is the property of another person who has a right to object to their production. It extends to the agent, ie, the possessor of the document, the same privilege which is enjoyed by the person whose property it is. The section is introduced for the protection of person whose title-deeds and other documents happen to be in the possession of his ... agents or servants ..., etc ... The extent of the obligation of the person

having interest in the document is the determining factor. If that person is compellable to give up possession, the custodian of the document is; if that person is not, then the custodian is not. In such case the consent of the owner of the documents would be necessary before a person can be compelled to produce them, or in other words, the consent of the owner is a condition precedent to the production of documents ... (Page 2225 of the commentary)

[18] See also *Ratnlal & Dhirajlal, The Law of Evidence* (21st edn.):

Comment – Persons in possession of documents on behalf of others are generally agents, attorneys, mortgagees, trustees, *et cetera*. The section extends to these persons of the same protection which the preceding section provides for a witness who is not a party to a suit.

It is not open to a litigant to refrain from producing a document which he considers to be irrelevant and if the opposing litigant is dissatisfied he may apply for its production and inspection. If he fails to do so, neither he nor the court at his suggestion is entitled to draw any inference as to its contents.

"Compelled" – The use of this word indicates that the person in possession of the document will be "allowed to produce documents which other persons would be entitled to refuse to produce if such were in their possession. This is in accordance with English law ..." (At page 716 of the commentary).

[19] Although these commentaries emphasise s. 131 as being an extension of s. 130, with its stress on the right not to disclose title deeds, the wording of s. 131 is wider than this. Indeed, the Malaysian s. 130 differs significantly from the Indian provision, since our statutory formula extends even to a witness "who is a party to the suit". See s. 130(2), as already quoted above.

[20] The general principle underlying s. 131 appears to be this: a person who is in possession of another person's document (say in his capacity as an agent), cannot be compelled to produce a document if that other person can refuse to do so.

[21] Properly read, and bearing in mind the general context and purpose of s. 131, I tend to be of the view that Huawei Malaysia cannot be compelled to disclose the contents of any documents which might result in the disclosure of confidential, secret or

privileged information on which Huawei Hong Kong might be in a position to raise an objection. Nevertheless, given the statutory wording, such documents can be produced "for the purpose of identification" only. Ultimately these issues under s. 131 can only be satisfactorily resolved if and when Huawei Hong Kong is added as a party, should this court so allow. Mr. James Ee is quite right, I believe, to stress the joint ownership of some of documents required to be disclosed.

[22] The prayers as presently worded are therefore too wide, and I agree as they stand, they are indefinite and amount to a "fishing expedition". Dato' Firoz Hussein has however agreed to concede and narrow down the application for discovery to the following:

(a) Correspondence and other documents between the 1st defendant and the 2nd defendant which have any mention of the plaintiff as its local partner;

(b) The tender documents for the projects mentioned in the letters of undertaking;

(c) These same documents should include documents in electronic form;

(d) Any contractual documents which might be relevant to the existence of the pleaded partnership;

(e) Minutes of meetings, in particular all minutes of meetings in which Mr. Chang Jin Jun was present in relation to the projects specifically referred to in the letters of undertaking/ partnership.

(f) Any sensitive or proprietary information in these documents shall be covered up after inspection by counsel for the plaintiff and the 1st defendant.

[23] By this narrowing down of the prayers, the plaintiff is now willing to take out the reference to purchase orders and statements of accounts as they are covered by the consent order, and so too the general reference to "whatever documents".

[24] In view of the strictures posed by s. 131, I feel any disclosure of documents from, or to, Huawei Hong Kong must also be limited to disclosure for purposes of identification merely, if the 1st defendant is of the opinion that it will not be at liberty to disclose under s. 131.

[25] Bearing in mind the willingness of the plaintiff to narrow down the application, as described above, the essential objection on "fishing expedition" is minimised, but the objection grounded on s. 131 is also to be recognised. In the circumstances, I am of the view that a further refinement of the prayers will be required. In particular I do not believe it would be fair or necessary for the fair disposal of the pleaded case to allow documents relating to all the projects mentioned in the letters of undertaking. The pleaded case relates to the project known as the Next Generation Network Project, and therefore this application for disclosure of documents should be so limited. I also feel that the reference to all contract documents to be disclosed should not be allowed, unless the plaintiff provides a more specific list of contract documents.

[26] Bearing in mind these principles, I am of the view that disclosure should only be allowed in the following terms below, and so it is ordered.

Order

[27] Order for discovery to be in the following terms:

(a) Correspondence and other documents between the 1st defendant and the 2nd defendant which have any mention of the plaintiff as the 1st defendant's local partner or involvement as local partner in the Next Generation Network project;

(b) The tender documents for the projects mentioned in the letters of undertaking;

(c) These same documents should include documents in electronic form;

(d) Minutes of meetings in relation to Next Generation Network project, in particular all minutes of meetings in which Mr. Chang Jin Jun was present in relation to the project.

(e) Any sensitive, confidential, trade secret, technical or proprietary information in these documents shall be covered up after inspection by counsel for the parties subject to the supervision of this court.

(f) Costs to be costs in the cause.